Office - Supreme Court, U.S.
FILED
JUL 28 1983
ALEXANDER L. STEVAS.
CLERK

NO. 82-2057

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DONALD LESIAK,

PETITIONER,

VS.

THOMAS E. FERGUSON,

AUDITOR OF THE STATE OF OHIO,

RESPONDENT

REPLY BRIEF

OF PETITIONER

CREDE CALHOUN
705 MALL BUILDING
118 ST. CLAIR AVENUE, N.E.
CLEVELAND, OHIO 44114
1-216-696-5390

COUNSEL FOR PETITIONER

JULY 25, 1983

THE DECISION OF THE OHIO COURT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE FEDERAL COURTS OF APPEAL

Respondent's Brief asserts that the opinions of the Ohio Courts do not conflict with the decisions of any Federal Court, and that the "holding" of the Ohio Court of Appeals is completely consistent with the law as settled by this Court in Pickering.

Respondent is correct, but only if the Federal Constitutional Law does not require a state court, in a public employee First Amendment discharge case, to directly confront the controlling constitutional issues raised by the applicable constitutional legal principles, and in such confrontation engage in a searching review of the evidentiary

facts. (See Petitioner's Brief, p.24, and Tygrett v. Barry, 627 Fed. 2d 1279 (D.C. Cir. 1980)

If anything, Respondent's Brief demonstrates the facility with which courts, when faced with political decisions, can facilely mouth the correct legal principles and then ignore their application to the facts. This is dramatically shown by page 15 of Respondent's Brief quoting the first syllabus of the Ohio Court of Appeals decision.

Four factors are set forth by the Ohio Court of Appeals as factors that must be considered. Yet, the Court completely ignores the second factor, whether the statements were true or false, and addresses the fourth factor, whether the employee's ability to efficiently perform his or her dutes was impaired, not by a

discussion of the evidence, but by the oblique and bald conclusion that:

> "In the case at bar the public interest is best served by permitting the State Auditor to terminate appellant's employment."

Obviously, without direct explication and instruction by this Court to the Ohio Courts, the First Amendment rights of Ohio's public employees will continue to be chilled as long as the Ohio Appeals Court decision remains to remind these employees, and their counsel, how easy it is for an Ohio Appellate Court to avoid the required constitutional search of the evidence.

It is submitted that such a search under the facts of this case would have required answers to many questions, including the following:

1. How could Petitioner be fired for oral statements to a reporter if

these statements were not known to Respondent on May 4, 1979 when Petitioner was discharged?

2. If these statements were known to Respondent, why did the Removal Order describe the subject of the interview as "regarding administrative procedures and policies regarding field audits of the Auditor of State's office?"

3. How could such statements make persons with whom Petitioner was dealing (university officials and employees) "leery" if these statements were not known to these persons and not directed toward them?

Because of the suggestion in Respondent's Brief, it must be emphasized that before the Personnel Board of Review Respondent did not take the position that the working relations between Petitioner and other employees in the

Auditor's office, including Petitioner's immediate superior, were in anyway impaired by Petitioner's statements to the press.

Respondent's Brief attempts to obscure the evasion by the Ohio Court of its duty to confront and determine the controlling issues raised by the applicable constitutional issues. It does this by a lengthy justification for Respondent's press policy, a justification not challenged by Petitioner, other than to point out the substantial difference in degree between the confidence inherent to other relations, as for example the attorney/client relation, and that which exists between a public officer and a public auditor with reference to information which it is, ultimately, the public's right to know and the auditor's obligation to disclose,

if public decisions are to be made rationally by an enlightened public.

Respectfully submitted,

Crede Calhoun
Crede Calhoun Co., L.P.A.
705 Mall Building
118 St. Clair Avenue, N.E.
Cleveland, Ohio 44114
1-216-696-5390

Attorney for Petitioner,
Donald Lesiak

July 25, 1983